Wagon Wheel Bowl, Inc. *and* Culinary Alliance & Bartenders Union, Local 498, affiliated with Hotel Employees & Restaurant Employees International Union, AFL–CIO. Case 31–CA–18747

March 31, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

Upon a charge filed by the Union on March 28, 1991, and an amended charge filed on May 28, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on May 29, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by polling unit employees as to their support for the Union at a time when the Respondent lacked sufficient objective evidence to support a reasonable doubt of the Union's majority support; by refusing to recognize and bargain with the Union based on the results of this poll; and by unilaterally implementing a new health insurance plan and discontinuing contributions to the Restaurant Employer-Employee Union Welfare Fund without bargaining with the Union.

On September 4, 1991, the General Counsel, the Union, and the Respondent filed with the Board a stipulation of facts and motion to transfer the case to the Board. The parties stated that the original charge, amended charge, complaint, stipulation of facts, and attached exhibits constitute the entire record in this case and that they waive a hearing before an administrative law judge. On November 13 the Board approved the stipulation and transferred the proceeding to itself for issuance of a Decision and Order.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation with an office and place of business in Oxnard, California, is engaged in the operation of a bowling alley and bar. The Respondent annually receives gross revenues in excess of $500,000 and purchases goods or receives services valued in excess of $50,000 directly from suppliers located outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Since at least 1970, the Union has been the collective-bargaining representative of the employees in the following appropriate unit:

> Included: All bartenders, waiters and waitresses employed by the Employer at its Oxnard, California facility.
> Excluded: All other employees, guards and supervisors as defined in the Act.

The Respondent recognized the Union as the collective-bargaining representative until January 29, 1991. The most recent collective-bargaining agreement was in effect from May 1, 1986, to May 1, 1990. Under that contract, unit employees received a 5-percent wage increase annually on September 1 from 1985 to 1989.

By letters dated February 27 and May 3, 1990, the Union requested bargaining for a new collective-bargaining agreement. By a letter dated June 15, 1990, the Respondent replied, requesting proposals for dates and locations for negotiations.

On July 13, 1990, the parties met, and the Respondent presented a proposal for a new collective-bargaining agreement containing provisions for a new employee health insurance plan, which the Respondent also intended to offer to nonunit employees, and for no wage increase for the term of the proposed agreement. The Respondent wrote to the Union on July 30, indicating that it was expecting additional medical insurance information and proposing further negotiations. Later that month, the parties exchanged bargaining proposals by mail. Correspondence regarding those and later counterproposals continued by mail through November 7, 1990. There have been no further negotiating sessions scheduled, nor has an agreement been reached.

On or about September 1, 1990, the Respondent unilaterally implemented a 5-percent wage increase for all unit employees. By an undated facsimile letter sent January 23, 1991, the Respondent notified the Union of its intention to conduct a poll among unit employees measuring their support for the Union. On January 25, Robert Roy, general counsel for the Ventura County Agricultural Association, conducted the poll. There were, at that time, 10 employees in the unit. Employees were polled by secret ballot and were given assurances against reprisals. The Respondent did not directly participate in the poll, nor was the Respondent present during the poll or at the tabulation of results.

To conduct the poll, the Respondent relied on the following considerations:

(1) At an unspecified time, an unknown number of unit employees in the bar department of the Respond-

ent's facility complained to the Respondent's president and owner, Edwin Boyd, that the health insurance plan provided for in the collective-bargaining agreement was inadequate and that employees had not been visited by a Union representative in many years.

(2) At an unspecified time, J. Ezell, a unit employee, exhausted the limits of the insurance coverage provided under the collective-bargaining agreement. Ezell then asked Boyd why the employees could not get a better health insurance plan. Boyd responded that the reason was that unit employees were represented by the Union, which was providing their current health insurance coverage.

(3) At an unspecified time, either Ezell or H. Frees, also a unit employee, asked Boyd how they could get out of the Union so they could get a health insurance plan similar to the plan being provided to the Respondent's nonunit employees. At that time, Frees stated to Boyd that, because he (Frees) was a part-time employee, he could not obtain enough work hours to qualify for the collective-bargaining agreement's health insurance plan. Frees stated that, in his 15 years of employment with the Respondent, he had never seen a Union representative visit the premises.

(4) At an unspecified time, Boyd overheard unit employees talking among themselves, asking why they were paying dues if a Union representative was never around, and asking what the Union was doing for the employees. Specifically, Boyd overheard unit employee Thompson state her dissatisfaction with the Union to other employees, asked what the Union was doing for the employees, and complained that the Union was never around. On another unspecified date, Boyd heard Hunt, a unit employee, tell employee Ezell about Hunt's dissatisfaction with the Union.

(5) At unspecified times, Boyd overheard unnamed unit employees generally complaining about the Union, particularly about the health insurance plan.

(6) About January 1991, Boyd overheard unnamed unit employees complaining about an increase in Union dues and complain generally that Union agents were not around and that ''the Union was not doing anything for them, so why should their dues increase?''

The ballots distributed to employees read as follows:

> The company has received information that the Bartenders and Waitresses/Waiters no longer wish to be represented by Local 498. The company is conducting a secret ballott [sic] poll to determine whether or not the majority of the employees desire to be represented by Local 498. You do not have to vote, and there will be no actions taken against anybody based upon the way in which a person does vote.
>
> Each employee is asked to fill out the ballot and drop it in the ballot box. Please do not sign the ballot. The employer does not desire to know how individuals vote.
>
> *Ballot*
>
> I desire to be represented by Local 498, Culinary Alliance and Bartenders Local, for purposes of collective bargaining.

Employees indicated their desire whether to continue to be represented by the Union by voting ''yes'' or ''no.'' Two unit employees voted yes; five voted ''no''; and three did not vote.

In a January 29, 1991 letter, the Respondent notified the Union that it was withdrawing recognition and has failed and refused since that time to recognize or bargain with the Union as the employees' exclusive collective-bargaining representative. The withdrawal of recognition was based on the considerations enumerated above on which the Respondent relied to conduct the poll and on the results of the poll itself.

B. *The Parties' Contentions*[1]

At issue is whether the Respondent had sufficient objective evidence to support a reasonable doubt of the Union's continued majority status and thus warrant the polling of the employees. The Respondent contends that it had this evidence before it conducted its employee poll and that the poll confirmed its doubt. Under *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989), enfd. on other grounds 922 F.2d 398 (5th Cir. 1991), the same ''reasonable doubt'' standard applies to the justification for either a poll of employee union support or withdrawal of recognition. The Respondent asserts that the objective evidence set forth above is sufficient to justify both actions. Alternatively, the Respondent urges the Board to reconsider the *Texas Petrochemicals* ''reasonable doubt'' polling standard and adopt the standard applied by the Ninth Circuit Court of Appeals in *Forbidden City Restaurant v. NLRB*, 736 F.2d 1295 (1984)—''substantial, objective evidence of a loss of union support''—or the standard of 30-percent employee support for withdrawal of recognition advocated by Chairman Stephens in his concurring opinion in *Texas Petrochemicals*.

The General Counsel contends that the Respondent's poll violated Section 8(a)(5) because the Respondent had insufficient objective considerations on which to base a reasonable doubt of the Union's majority status. Under the ''reasonable doubt'' standard, the General Counsel contends, the Respondent's evidence fails. According to the General Counsel, the oral reports of dissatisfaction with the Union cited by the Respondent were unreliable because Company President Boyd did not relate the number or identity of employees alleged to have made statements, nor the time or location of

[1] Only the General Counsel and the Respondent have filed briefs.

the statements. The General Counsel argues that the statements did not pertain to employee desires with respect to union representation but reflected a range of complaints about the quality of representation. The General Counsel asserts that the Respondent's evidence is insufficient to justify its poll even under the alternative standards advanced by the Respondent.

C. *Discussion*

We agree with the General Counsel that, under Board law or any of the standards that the Respondent urges the Board to adopt, the Respondent's evidence falls short of substantiating the claim that it had adequate objective considerations on which to justify its poll of employees' continued union support. The Respondent relies principally on statements by employees complaining about union dues increases, how few visits union representatives made to the Respondent's premises, or contractual employee benefits such as health insurance coverage. In addition, the Respondent relies on evidence that either employee Ezell or employee Frees asked Company President Boyd how to ''get out of the Union'' to qualify for an insurance plan other than that provided under the union contract.

In *Destileria Serralles, Inc*., 289 NLRB 51 (1988), the Board held that general statements that employees are ''dissatisfied'' with their union and disenchanted with its past performance do not amount to the expression of a ''current desire to be rid of Union representation.'' Here, all but one of the employee statements advanced to support the poll are mere expressions of dissatisfaction with the *quality* of representation by the Union, not ''the claimed desire of these employees to be rid of the union.''[2] Further, only one of these statements is placed within any time frame whatsoever in relation to the Respondent's poll. As to the statement of the one employee who asked how to ''get out of the Union,'' the Respondent neither specifically identified which employee made the statement nor when it was made. These statements are not '''objective, identifiable acts' [that] . . . can form the basis for an employer's doubts''[3] like those the Board has found may qualitatively satisfy withdrawal of recognition.[4]

In short, the probative evidence relied on by the Respondent does not on its face show sufficient objective considerations to support the Respondent's asserted doubt of the Union's majority status and is insufficient to support its claim that polling employees was justified under *Texas Petrochemicals*. As the Respondent further notes, however, three circuit courts of appeals have held that the objective evidence necessary to justify conducting a poll, although it must be substantial, need not meet the high standard necessary for withdrawal of recognition.[5] Without addressing the merits of this ''substantial loss of support'' standard favored by these circuits, we find that the Respondent's evidence fails also under this less-rigorous test because it does not manifest the requisite ''substantial'' showing of loss of support. Thus, as noted by Chairman Stephens in his *Petrochemicals* concurring opinion, of the three circuits applying separate standards for polling and for withdrawal of recognition, only the Sixth Circuit has actually found evidence sufficient to meet its test, and there a full one-third of the employees had made statements manifesting lack of support for the union.[6]

Having rejected the Respondent's contention that its poll was objectively justified, we find, as alleged in the complaint, that the Respondent unlawfully polled employees as to their union support at a time when the Respondent had insufficient objective evidence of lack of support;[7] that it unlawfully refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the unit; that it unilaterally implemented a new health insurance plan for unit employees and ceased making contributions to the Restaurant Employer-Employee Union Welfare Fund and that it made these changes without affording the Union notice and an opportunity to bargain.

CONCLUSIONS OF LAW

1. By polling unit employees as to their union support at a time when the Respondent had insufficient objective evidence of lack of union support, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. By refusing to recognize and bargain with the Union as exclusive collective-bargaining representative for unit employees, the Respondent has violated Section 8(a)(5) and (1) of the Act.

---

[2] *Cornell of California*, 222 NLRB 303, 306 (1976), enfd. 577 F.2d 513 (9th Cir. 1978).

[3] Cf. *Sofco, Inc*., 268 NLRB 159, 160 (1983).

[4] Member Raudabaugh would find that an employee's question concerning how to ''get out of the Union'' is an indication that the employee does not wish to be represented by the Union. In addition, even if the employer cannot recall specific employee X or Y, the employer can rely on it as an indication that at least one employee has indicated that he/she does not wish to be represented. However, Member Raudabaugh notes that, in the instant case, only one employee has so indicated, and the Respondent has not established when this occurred.

[5] *NLRB v. A. W. Thompson, Inc*., 651 F.2d 1141 (5th Cir. 1981); *Thomas Industries v. NLRB*, 687 F.2d 863 (6th Cir. 1982); *Forbidden City Restaurant v. NLRB*, 736 F.2d 1295 (9th Cir. 1984). See also the concurring opinion of Chief Justice Rehnquist in *NLRB v. Curtin Matheson Scientific Corp*., 494 U.S. 775, 797 (1990).

[6] Chairman Stephens stated that he did ''not necessarily subscribe to all the Sixth Circuit's reasons for concluding that its standard was met there,'' but found the one-third figure to be ''a significant one.'' 296 NLRB at 1065. As none of the employee statements relied on by the Respondent establishes rejection of the Union by even one unit employee, much less one-third of the unit, the evidence fails to pass muster under Chairman Stephens' view as well.

[7] In so holding, we do not pass on the continued validity of *Texas Petrochemicals*.

3. By unilaterally implementing a new health insurance plan for unit employees without affording the Union notice and an opportunity to bargain, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. By unilaterally ceasing contributions to the Restaurant Employer-Employee Union Welfare Fund, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. These violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of unit employees. We shall order the Respondent to make its employees whole by paying all contributions to the Restaurant Employer-Employee Union Welfare Fund, as provided in the expired collective-bargaining agreement between the Union and the Respondent, which have not been paid and which would have been paid in the absence of the Respondent's unilateral discontinuance of the payments[8] and to make unit employees whole for any losses they have incurred as a result of the Respondent's unilateral discontinuance of the payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970). All payments to employees shall be made with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Nothing, however, in this Order shall be construed as requiring the Respondent to rescind the health insurance plan benefits which it unilaterally established in violation of the Act.[9]

ORDER

The National Labor Relations Board orders that the Respondent, Wagon Wheel Bowl, Inc., Oxnard, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Polling employees as to their union support without sufficient objective evidence of lack of union support.

(b) Refusing to recognize and bargain with Culinary Alliance & Bartenders Union, Local 498, affiliated with Hotel Employees & Restaurant Employees International Union, AFL–CIO, as the exclusive bargaining representative of the employees in the appropriate unit.

(c) Unilaterally implementing a new health insurance plan for unit employees and unilaterally ceasing to make contributions to the Restaurant Employer-Employee Union Welfare Fund on behalf of unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> Included: All bartenders, waiters and waitresses employed by the Employer at its Oxnard, California facility.
>
> Excluded: All other employees, guards and supervisors as defined in the Act.

(b) Tender the contributions to the Restaurant Employer-Employee Union Welfare Fund and make any bargaining unit employees adversely affected by its unlawful conduct whole for any loss suffered as a result of that conduct in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Oxnard, California, copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[8] Any additional amounts due the fund shall be computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[9] See *Stone Boat Yard*, 264 NLRB 981, 983 fn. 7 (1982).

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT poll our employees as to their union support without sufficient objective evidence of the lack of union support.

WE WILL NOT refuse to recognize and bargain with Culinary Alliance & Bartenders Union, Local 498, affiliated with Hotel Employees & Restaurant Employees International Union, AFL–CIO, as the exclusive bargaining representative of the employees in bargaining unit.

WE WILL NOT unilaterally implement a new health insurance plan for unit employees.

WE WILL NOT unilaterally cease to make contributions to the Restaurant Employer-Employee Union Welfare Fund on behalf of unit employees.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> Included: All bartenders, waiters and waitresses employed by the Employer at is Oxnard, California facility.
>
> Excluded: All other employees, guards and supervisors as defined in the Act.

WE WILL tender all delinquent contributions to the Restaurant Employer-Employee Union Welfare Fund and reimburse our unit employees for any expenses ensuing from the failure to make those payments with interest.

WAGON WHEEL BOWL, INC.